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Public Prosecutor v Ragunathan a/l Rajoo

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HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45A-209–12 OF 2013
AKHTAR TAHIR J
6 NOVEMBER 2015

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Criminal Procedure — Prosecution — Duty of prosecution officer — Whether prosecution should not just adduce minimal evidence to prove its case but negate case for defence to discharge burden of proving case beyond reasonable doubt — Whether prosecution should call all witnesses relevant to unfolding of events particularly in capital punishment cases to fully discharge burden of proof — Whether court would be compelled to invoke adverse inference against prosecution if crucial witnesses were deliberately not called or important documentary evidence not produced

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The accused faced a first charge of trafficking in a combination of 169g of heroin and 89.2g of monoacetylmorphines and a second charge of trafficking in 301.1g of methamphetamine, both offences under s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution's evidence against the accused rested largely on the testimonies of two police officers, SP2 and SP6. SP2 testified that his superior, Insp Saravanan told him to pose as a drug buyer and arranged for SP2 to meet with a person called 'Boy'. Boy met SP2 at a parking lot, pointed to a parked car and said the drugs could be bought from 'the Boss' who was in the car. Although SP2 did not get to see who the occupant in the car was, his investigation revealed the car belonged to the accused's brother who had allowed the accused to use it at the material time in connection with the latter's car rental business. The car turned out to be the same one the accused was found to be in when he was arrested and in which the incriminating drugs were found. The prosecution adduced evidence that following that first meeting between SP2 and Boy, two further meetings were arranged by Insp Saravanan – the second meeting was allegedly between SP2 and the accused at a restaurant to finalise the amount and price of the drugs to be bought while the third meeting was to fix the place and time for the final transaction. It was alleged that at the appointed place and time, SP2 and SP6 met with the accused and, after they were shown the drugs in the car, a police party lying in ambush arrested the accused. Finding that the prosecution had established a prima facie case, the court called upon the accused to enter his defence. In his testimony, the accused denied ever meeting with SP2 prior to his arrest. He said the car from which the drugs were seized was rented to Boy and the documents pertaining to the rental were seized by police from his apartment following his arrest. The accused said Boy had wanted to rent the car for a month but

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changed his mind and wanted to return it earlier and get a refund of his deposit. The accused said he refused to refund the deposit and it was then decided that Boy would leave the car at a car park for the accused to collect it but when the accused approached the car he was arrested by police. The accused said he did not know of the drugs in the car and that the car rental documents the police seized from his apartment were never returned to him nor produced at the trial.

Held, acquitting and discharging the accused:

(1) The prosecution failed to prove the charges against the accused beyond reasonable doubt. Accordingly, pursuant to s 182A(ii) of the Criminal Procedure Code, the accused was acquitted and discharged (see paras 35–36).

(2) The reasonable doubt in this case arose from no evidence being adduced. The reasonable doubt was as to the role played by the accused which was of paramount importance as this was a case of direct trafficking. The law did not envisage a death sentence for a mere carrier although he could be punished on a lesser scale. It was not the court's duty to ascertain and determine the nature of the offence of the accused in the light of the evidence adduced. The duty to initiate prosecution and decide on the offence committed by the accused lay squarely on the shoulders of the prosecution (see para 31).

(3) Although the prosecution could choose to call any witnesses it wanted, it could not ignore its burden to prove the charge against the accused beyond reasonable doubt. In other words, the prosecution should not be satisfied with just adducing minimal evidence to prove its case but it had a duty to call all witnesses relevant to the unfolding of the events in order to discharge the burden of proof beyond reasonable doubt especially in a capital punishment case. The burden upon the prosecution lay not only in adducing evidence to prove the charge against the accused but it had an intrinsic duty to negate the case for the defence in order to discharge the burden of proving the case beyond reasonable doubt. The law had chosen the word 'beyond' reasonable doubt, envisaging that the prosecution must not stop short but go beyond in proving its case (see paras 25 & 32).

(4) The failure to call Insp Saravanan to testify, although he was present during the trial and was produced for identification, raised a serious and adverse inference against the prosecution, ie that the prosecution did not want to call Insp Saravanan because by calling him it could damage the prosecution's case. Insp Saravanan played a pivotal role in this case and it was clear all the three meetings were arranged by him. In arranging those meetings, Inspector Saravanan would surely have spoken to someone; it could have been the accused or someone else. He would have known the identities of Boy and Hussein who were equally relevant witnesses in this case and were, in fact, equal culprits with the accused in the whole

transaction. The question was why only the accused was targetted to be charged? Was he a mere scapegoat? (see paras 24 & 26–27).

(5) The prosecution could not disprove the fact that the car was rented to Boy. The court took judicial notice of the fact the prosecution failed to produce the documents seized from the accused's condominium which included the car rental documents even after being directed to do so by the court. A reasonable inference could be made that it was Boy who had driven the car to the parking lot at the first meeting and that Boy's pointing to the car could have been a red herring aimed at incriminating the accused if the drug transaction failed (see para 19).

(6) SP2 was a shifty witness. Apart from inconsistencies in his evidence, he was not at all comfortable when giving evidence. He repeatedly cringed and kept silent when questioned on certain crucial matters. In comparison, the accused was consistent in denying the second meeting with SP2 even under intense cross-examination. The court could not say whether the accused was telling the truth but he had certainly raised a reasonable doubt about the second meeting with SP2 (see para 20).

[Bahasa Malaysia summary

Tertuduh dipertuduh dengan pertuduhan pertama mengedar kombinasi 169g heroin dan 89.2g monoacetylmorphines dan pertuduhan kedua mengedar 301.1g methamphetamine, kedua-duanya kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Keterangan pihak pendakwaan terhadap tertuduh sebahagian besarnya bersandar pada keterangan dua orang pegawai polis iaitu SP2 dan SP6. SP2 memberi keterangan bahawa pegawai atasannya, Insp Saravanan mengarahkannya untuk menyamar sebagai pembeli dadah dan mengaturkan SP2 untuk bertemu dengan seorang bernama 'Boy'. Boy bertemu dengan SP2 di tempat letak kereta, menunjukkan sebuah kereta yang diletak di situ dan memberitahu bahawa dadah boleh dibeli daripada 'Boss' yang berada di dalam kereta. Walaupun SP2 tidak dapat melihat orang di dalam kereta tersebut, siasatannya mendedahkan bahawa kereta tersebut dimiliki saudara lelaki tertuduh yang membenarkan tertuduh menggunakannya pada masa material bagi tujuan perniagaan kereta sewanya. Kereta tersebut rupa-rupanya kereta yang sama di mana tertuduh dijumpai semasa dia ditangkap dan di mana dadah-dadah dijumpai. Pihak pendakwaan mengemukakan keterangan bahawa berikutan perjumpaan pertama antara SP2 dan Boy, dua perjumpaan lanjut diatur oleh Insp Saravanan – perjumpaan kedua dikatakan berlaku antara SP2 dan tertuduh di restoran untuk memuktamadkan jumlah dan harga dadah yang hendak dibeli manakala perjumpaan ketiga diadakan untuk menetapkan tempat dan masa transaksi terakhir. Didakwa bahawa di tempat dan pada masa yang ditetapkan, SP2 dan SP6 bertemu dengan tertuduh dan selepas dadah dalam kereta ditunjukkan kepada mereka, pasukan polis yang bersedia untuk menyerang hendap telah menangkap tertuduh. Memutuskan bahawa pihak pendakwaan berjaya

membuktikan satu kes prima facie, mahkamah memanggil tertuduh untuk membela diri. Dalam keterangannya, tertuduh menafikan pernah berjumpa dengan SP2 sebelum tangkapannya. Dia menyatakan bahawa kereta di mana dadah tersebut dirampas disewakan kepada Boy dan dokumen berkenaan sewaan juga dirampas dari pangsapuri berikutan tangkapannya. Tertuduh menyatakan bahawa Boy ingin mendapatkan sewa kereta bagi sebulan tetapi berubah fikiran dan ingin memulangkannya dan mendapatkan pemulangan deposit. Tertuduh menyatakan bahawa dia enggan memulangkan deposit dan diputuskan bahawa Boy akan meninggalkan kereta tersebut di tempat letak kereta untuk tertuduh mengambilnya tetapi apabila tertuduh menghampiri kereta tersebut, dia ditangkap oleh polis. Tertuduh mendakwa bahawa dia tidak tahu tentang dadah dalam kereta tersebut dan bahawa dokumen sewa kereta yang dirampas oleh polis daripada pangsapurinya tidak dipulangkan kepadanya mahupun dikemukakan di mahkamah.

Diputuskan, melepaskan dan membebaskan tertuduh:

(1) Pihak pendakwaan gagal membuktikan pertuduhan terhadap tertuduh melampaui keraguan munasabah. Sewajarnya, di bawah s 182A(ii) Kanun Tatacara Jenayah, tertuduh dilepaskan dan dibebaskan (lihat perenggan 35–36).

(2) Keraguan munasabah dalam kes ini timbul daripada keterangan yang tidak dikemukakan. Keraguan munasabah adalah tentang peranan yang dimainkan oleh tertuduh yang merupakan sesuatu yang sangat penting kerana kes ini melibatkan pengedaran langsung. Undang-undang tidak membayangkan hukuman mati tetapi sekadar pembawa walaupun dia boleh dijatuhkan hukuman yang lebih ringan. Bukan tanggungjawab mahkamah untuk mengenal pasti dan memastikan sifat kesalahan tertuduh berdasarkan keterangan yang dikemukakan. Tanggungjawab untuk memulakan pendakwaan dan memutuskan tentang kesalahan yang dilakukan oleh tertuduh terletak sepenuhnya pada pihak pendakwaan (lihat perenggan 31).

(3) Walaupun pihak pendakwaan boleh memilih untuk memanggil mana-mana saksi yang diinginkan, ia tidak boleh mengabaikan beban membuktikan pertuduhan terhadap tertuduh melampaui keraguan munasabah. Dalam kata lain, pihak pendakwaan tidak sepatutnya berpuas hati dengan hanya mengemukakan keterangan minima untuk membuktikan kesnya tetapi ia mempunyai tanggungjawab memanggil saksi-saksi relevan untuk menghuraikan peristiwa-peristiwa bagi melepaskan beban membuktikan melampaui keraguan munasabah khasnya dalam kes hukuman mati. Beban pihak pendakwaan bukan sekadar mengemukakan keterangan untuk membuktikan pertuduhan terhadap tertuduh tetapi menjadi kewajipan inheren untuk menafikan kes pembelaan bagi melepaskan beban membuktikan kes melampaui

keraguan munasabah. Undang-undang memilih perkataan 'melampaui' keraguan munasabah, membayangkan bahawa pihak pendakwaan tidak boleh terhenti tetapi mesti melampaui dalam membuktikan kesnya (lihat perenggan 25 & 32).

(4) Kegagalan memanggil Insp Saravanan, walaupun dia ada semasa perbicaraan dan dikemukakan bagi pengecaman, membangkitkan inferen serius dan bertentangan dengan pihak pendakwaan iaitu pihak pendakwaan tidak mahu memanggil Insp Saravanan kerana dengan memanggilnya, kes pendakwaan akan terjejas. Inspektor Saravanan memainkan peranan penting dalam kes ini dan jelas dalam ketiga-tiga perjumpaan yang diatur olehnya. Dalam mengatur kesemua perjumpaan ini, Insp Saravanan pastinya ada bercakap dengan seseorang; mungkin tertuduh atau orang lain. Dia mungkin tahu identiti Boy dan Hussein yang kedua-duanya saksi relevan dalam kes ini dan kedua-duanya dalang bersama-sama tertuduh dalam keseluruhan transaksi. Persoalannya, mengapa tertuduh sahaja yang disasarkan untuk dipertuduh? Adakah dia sekadar kambing hitam? (lihat perenggan 24 & 26–27)

(5) Pihak pendakwaan tidak dapat menyangkal fakta bahawa kereta tesebut disewakan kepada Boy. Mahkamah menerima notis kehakiman tentang fakta bahawa pihak pendakwaan gagal mengemukakan dokumen-dokumen yang dirampas dari kondominium tertuduh termasuk dokumen sewa kereta walaupun selepas diarahkan berbuat demikian oleh mahkamah. Satu kesimpulan munasabah yang boleh dibuat adalah Boy yang telah memandu kereta ke tempat letak kereta semasa perjumpaan pertama dan bahawa Boy yang menunjukkan ke arah kereta boleh menjadi satu petanda untuk mensabitkan tertuduh jika urus niaga gagal (lihat perenggan 19).

(6) SP2 seorang saksi yang berbolak-balik. Selain daripada percanggahan dalam keterangannya, dia tidak selesa sama sekali semasa memberikan keterangan. Dia berkali-kali berasa malu dan berdiam diri ketika disoal mengenai perkara-perkara penting tertentu. Sebagai perbandingan, tertuduh konsisten dalam menafikan perjumpaan kedua dengan SP2 walaupun diperiksa balas secara keterlaluan. Mahkamah tidak boleh memutuskan sama ada tertuduh bercakap benar tetapi dia pastinya menimbulkan keraguan munasabah mengenai pertemuan kedua dengan SP2 (lihat perenggan 20).]

Notes

For a case on duty of prosecution officer, see 5(2) *Mallal's Digest* (5th Ed, 2015) para 3462.

Cases referred to

Aedy Osman v PP [2011] 1 CLJ 273, FC (refd)
Ooi Chee Seong & Anor v PP [2014] 3 MLJ 593; [2014] 7 CLJ 505, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 459, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
PP v Sanin bin Othman [2011] 5 MLJ 716; [2011] 1 CLJ 626, CA (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), 182A, 182A(ii)

Hasila bt Awang (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Muhammad Shafee bin Md Abdullah (Tania Scivetti and Wan Azwan Aiman bin Wan Fakhruddin with him) (Shafee & Co) for the accused.

Akhtar Tahir J:

THE CHARGE

The accused in this case was charged as follows:

Pertuduhan Pertama

Bahawa kamu pada 18 Januari 2013 jam lebih kurang 3.15 petang di tempat meletak kenderaan berhampiran 'Tadika Detik Bersatu', jalan Pandan Indah 1/16, Ampang Jaya Selangor, di dalam daerah Ampang Jaya, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu dadah jenis Heroin seberat 169.0 gram dan 89.2 gram Monoacethylmorphines, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 *yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.*

Pertuduhan Kedua

Bahawa kamu pada 18 Januari 2013 jam lebih kurang 3.15 petang di tempat meletak kenderaan berhampiran 'Tadika Detik Bersatu', jalan Pandan Indah 1/16, Ampang Jaya Selangor, di dalam daerah Ampang Jaya, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu dadah jenis Methamphetamine dengan seberat 301.1 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 *yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.*

THE EVIDENCE OF THE PROSECUTION

[1] The evidence of the prosecution relating to the events leading to the arrest of the accused primarily rested on the evidence of two police witnesses ('SP2') L/Kpl Kamarudin bin Mohd Lattif and ('SP6') Insp Prem a/l Seperamaniam who had impersonated as drug buyers after being appointed as agent provocateurs ('AP').

[2] The evidence of SP2 was that he was appointed as an AP by Insp Saravanan. Upon his appointment as an AP the first meeting SP2 had in relation to buying of drugs was with a person called 'Boy' at Batu Caves. This meeting was arranged by Insp Saravanan. SP2 conveyed his interest in the buying of drugs to Boy and enquiring about the price. Boy had pointed to a car with the registration No PEH 9657 at the parking lot of Batu Caves divulging that the person sitting in the car was the boss. SP2 however did not see the person in the car. Upon investigation by the police it was discovered that the car was used by the accused at the material time. The car actually belonged to the brother of the accused Vijayan a/l Rajoo ('SP5') who had given the car to the accused to be used for the accused car rental business. According to the testimony of SP2 and SP6 this was also the same car driven by the accused on the day of his arrest and in which the drugs were found.

[3] A second meeting was arranged by Insp Saravanan between SP2 and the accused. At this meeting with the accused the deal to buy the amount of drugs and the price was finalised. This meeting took place in a restaurant and was attended only by SP2 and the accused.

[4] A third meeting was arranged by Insp Saravanan for the delivery of the drugs and handing over the flash roll. On this occasion SP6 was roped in to be the second AP. On a briefing which was attended by Insp Saravanan, SP2, SP6, ASP Mohd Husni bin Manaf ('SP7') and two other senior police officers, the flash roll to purchase the drugs was handed to SP6.

[5] On the appointed day of delivery of the drugs on 18 January 2013. SP2 and SP6 went together in their vehicle at the designated agreed spot in Pandan Indah. SP2 was constantly in touch with the accused. Upon arriving at the agreed place SP2 contacted the accused. The accused expressed a desire to see the money and count the money. For this purpose the accused came into the car in which SP2 and SP6 were in and sat at the passenger seat together with SP6.

[6] After having counted the money and being satisfied it was the correct amount, the accused asked SP6 to follow him to the place where he had parked his car. On reaching the car the accused showed the drugs to SP6. On confirming the presence of the drugs SP6 signaled the raiding party to make the raid and arrest.

[7] The raiding party duly made the raid and arrest and after a brief struggle managed to apprehend the accused. The drugs were seized by the raiding officer and brought back to the police station together with the accused.

[8] After making the proper markings and preparing the necessary documentation the drugs were handed over to the investigating officer. The

investigating officer kept the drugs under lock and key and further steps were taken to photograph the drugs and the other exhibits.

[9] As part of his investigation the investigating officer sent the drugs to the chemistry department for analysis. At the chemistry department the drugs were analysed by the chemist. On analysis it was confirmed that the drugs were of the type and the weight as stated in the two amended charges against the accused. In the first amended charge the drug trafficked was a combination of 169g of heroin and 89.2g of monoacetylmorphines whereas in the second charge the dug trafficked was stated as 301g of methamphetamine.

THE DECISION AT THE END OF THE PROSECUTION'S CASE

[10] It is incumbent upon the court at the end of the prosecution's case to evaluate the evidence led by the prosecution to determine whether the prosecution has proven a prima facie case. This is enjoined in the statutory provision contained in s 180(1) of the Criminal Procedure Code which states that:

> When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

In the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 459 the duty of the court in determining whether the burden of prima facie had been discharged was spelled out as follows:

> This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See, *Tai Chai Keh v Public Prosecutor* [1948-49] MLJ Supp 105; *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused.

[11] After evaluating the evidence of the prosecution witnesses and considering the sequence of events I was satisfied that the prosecution had made out a prima facie case of direct trafficking. I also accepted the testimony of the chemist as to the type and weight of the drugs. Finally there was no break in the chain of evidence from the time the drugs were seized right until the time the drugs were sent to the chemistry department and finally produced in court.

[12] I therefore directed the accused to defend himself. The accused chose to give evidence under oath and also called his girlfriend Ananthi a/p Krishnan Murthi ('SD2') as his witness.

THE DEFENSE

[13] In his testimony the accused denied being in the car at Batu Caves at the date and time mentioned by SP2 to be the first meeting with the alleged drug dealers. The accused also flatly denied meeting SP2 at the second meeting where the purchase of the drugs was finalised.

[14] As to the day of his arrest and being caught with the drugs the accused alleged that he was in car rental business and the particular car from which the drugs were seized was actually rented to a person called Boy. The accused gave details of the rental agreement with the said Boy. There were also documents detailing the rental to Boy. These documents according to the accused were seized by the police from his apartment. The accused also described Boy and another person who had come with Boy to collect the car.

[15] The person called Boy had initially agreed to rent the car for a period of one month but had later wanted to return the car earlier. In the afternoon of the day of his arrest on 18 January 2013 according to the testimony of the accused he was with his girlfriend at the shopping complex where the girlfriend worked. While having lunch with his girlfriend he received a call from the said Boy wanting to return the car. Boy had also asked for a refund of the deposit which the accused had refused to return. This has upset Boy and it was then decided by Boy and the accused that Boy would leave the car at a car park at Jalan Pandan Indah. The accused agreed to take the car from there and the accused asked Boy to conceal the car key at the back tyre of the car.

[16] The accused than hastily left his girlfriend to collect the car. According to the accused he went to Jalan Pandan Indah in his Mitsubishi Lancer which he parked at his condominium which was nearby and walked to the place where the car was parked. He went to the car and stoped down to retrieve the key from the back tyre. At this point of time he was approached by a group of people menacingly and not knowing who they were the accused tried to flee but was apprehended. Only then he said he realised that the groups of people were actually police officers.

[17] The accused confirmed that the police had seized a black bag from the car. The accused however contended that he had no inkling of what was in the bag nor the police informed him of the contents. The police then arrested him despite the accused pleading his innocence.

[18] The accused was then brought to his apartment from which the police seized important document including the car rental documents. He contended these documents were never returned to him and until the end of the trial the documents were not produced in court or shown to the accused.

EVALUATION OF THE DEFENSE AND THE DECISION AT THE END OF THE CASE

[19] As to the denial of the accused as to the first meeting with SP2 at Batu Caves the court had to consider the admission of SP2 that he had not seen the person sitting in the car referred to Boy as the 'Boss'. In the face of this admission by SP2, the court could not dismiss the testimony of the accused that he was not at Batu Caves at the first meeting. In other words the accused could be telling the truth that he was not at the place where SP2 had met Boy. Even more intriguing was the fact that the prosecution could not disprove the fact that the car at Batu Caves had been rented to Boy. I took judicial notice of the fact that the prosecution failed to produce all the documents seized from the condominium of the accused which included the car rental documents. The prosecution failed to produce the documents even after the court had directed for the production of the documents. A reasonable inference could therefore be made that it was Boy who had drove the car to Batu Caves and for Boy to point to the car could have been a red herring aimed at incriminating the accused in the event the drug transaction failed.

[20] The accused also denied meeting SP2 at a second meeting. As the second meeting only involved SP2 and the accused, the court had had to choose whether to believe the testimony of SP2 or the accused. In order to come to a conclusion the court had to evaluate and dissect the evidence of both the witnesses carefully. I started by playing back the recording of the testimony of SP2 in order to review and revisit the evidence of SP2. In reviewing the evidence of SP2 I noted that SP2 had been inconsistent on two matters and kept on changing his evidence on these two matters. The first was with regards as to who had introduced SP6 to the accused at the third meeting. SP2 had testified earlier that SP6 had introduced himself to the accused but under persistent cross-examination he admitted that it was he who had introduced SP6 to the accused. The other more serious contradiction was who had handed the flash roll to SP6. Initially SP2 was adamant that it was Insp Saravanan who had handed the flash roll. On cross-examination when asked repeatedly by the defense counsel he changed his testimony and stated that another senior officer had handed the flash roll. Apart from inconsistencies in his evidence I also observed while SP2 was testifying that SP2 was not at all comfortable when giving evidence. He repeatedly cringed and kept silent when being questioned on certain crucial matters. On review the label which I could stick on SP2 was that he was a shifty witness. In comparison the accused was consistent in denying this second meeting with SP2, even under intense cross-examination

by the prosecution. As a result of my finding I could not say whether the accused was telling the truth but he had certainly raised a reasonable doubt in my mind about this second meeting with SP2.

[21] There was also contradictory evidence between the witness for the prosecution and the evidence of the accused on the third meeting on 18 January 2013. The prosecution's witnesses consisting of SP2, SP6 and SP7 had corroborated each other on the events leading to the raid and the arrest of the accused. Although I had doubts as to the credibility of SP2 I found both SP6 and SP7 to be a consistent and truthful witness. On the events occurring at the third meeting I therefore chose to believe the evidence of the prosecution witnesses rather than the evidence of the accused.

[22] In believing the evidence of the prosecution witnesses and from the sequence of events as narrated by this prosecution witnesses it was proven beyond reasonable doubt that the accused had come to the designated spot on 18 January 2013 to deliver the drugs and collect the payment.

[23] However the question haunting me at the end of the case was the role of the accused in this whole episode? Was he the Boss or was he just a delivery boy? This question arose from the fact that the accused was not the sole target or suspect in this case. Two other names had cropped up during the testimony of SP2 that of Boy and Hussein. Boy had also pointed to a car at Batu Caves and referred to the occupant as the Boss.

[24] The prosecution had the means to unravel this mystery if they had taken note a matter raised by the defense from the very beginning of the case about the non-calling of a very relevant and important witness. This witness played a pivotal role in the events that took place in this case. This witness Insp Saravanan's name cropped almost all the time during the testimony of SP2 and the other prosecution witness. It was clear that all the three meeting were arranged by Insp Saravanan. In arranging the three meeting surely Insp Saravanan would have spoken to someone. It could be the accused or any other person the court at this stage was at not at liberty to speculate.

[25] Although the prosecution can choose to call any witnesses they wanted, the prosecution could not ignore the burden placed on it to prove the charge against the accused beyond reasonable doubt. In other words the prosecution should not be satisfied by just adducing minimal evidence to prove its case. It was incumbent and in fact a duty upon the prosecution to call all witnesses relevant to the unfolding of the events in order to discharge the burden of proof beyond reasonable doubt especially in a capital punishment case.

[26] The failure of the prosecution in calling Insp Saravanan although he was present during the trial and had in fact been produced in court for identification raises a serious and adverse inference against the prosecution. The adverse inference being that the prosecution did not want to call Insp Saravanan because by calling Insp Saravanan it could damage their case. Even if this was the reason it does not excuse the prosecution from calling Insp Saravanan if it helps the court in arriving at a just decision.

[27] Inspector Saravanan would also have known the identities of Boy and Hussein. The two, Boy and Hussein are equally relevant witnesses in this case and in fact are equal culprits with the accused in the whole drug transaction. The question is why only the accused was targeted to be charged? Was the accused a mere scapegoat? All these questions remain unanswered even until the end of the trial. In a criminal trial an unanswered question is fatal to the proof of the entire case.

[28] The position of the law with regards to the court's duty at the end of the defense case is stated in s 182A of the Criminal Procedure Code and the duty can be summarised as being twofold. The first is the court's duty to consider all the evidence adduced before it. This would mean the court has to consider the evidence as led by the prosecution as well as the defense. The second duty is after considering all the evidence adduced before it to the court has to decide whether the prosecution has proved its case beyond reasonable doubt. It is significant to note that the burden of proof lies upon the prosecution and no mention is made of the defense.

[29] This duty is encapsuled in the case of *Public Prosecutor v Sanin bin Othman* [2011] 5 MLJ 716; [2011] 1 CLJ 626 where in the relevant portion it is stated as follows:

> Only after he has gauged the total evidence adduced inclusive of all the evidence at the prosecution's stage and tested as against the defense evidence may the fate of the accused decided by the court. In short there will be a maximum evaluation of the whole evidence at the close of the defense.

[30] What amounts to reasonable doubt has been explained in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 as follows:

> It has been again said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there ... A reasonable doubt must be doubt arising from the evidence and cannot be an imaginary doubt or conjecture unrelated to the evidence.

[31] In the case above it is highlighted that the reasonable doubt must arise from the evidence adduced. In this case it can be added that the reasonable doubt has arisen from no evidence being adduced. The reasonable doubt in this case is as to the role played by the accused which is of paramount importance as this a case of direct trafficking. The law does not envisage a death sentence for a mere carrier although he could be punished on a lesser scale. It is not the court's duty to ascertain and determine the nature of the offense of the accused in the light of the evidence adduced in this case. The duty to initiate prosecution and decide on the offense committed by the accused lies squarely on the shoulder of the prosecution.

[32] A trite point to note is that the burden upon the prosecution lies not only in adducing evidence in proving the charge against the accused but it is an intrinsic duty upon the prosecution to negate the case for the defense in order to discharge the burden of proving the case beyond reasonable doubt. It is significant that the law has chosen the word 'beyond' reasonable doubt. The law envisages that the prosecution must not stop short but go beyond in proving their case. Although the prosecution can choose the number and identity of witnesses they want to be call, the law in no way gives any liberty to the prosecution to fall short of the standard of proof stipulated.

[33] I agree that a significant portion of the prosecution's duty lies in negating the defense as stated in the case of *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593; [2014] 7 CLJ 505. It was stated in this case as follows:

> It is trite law that the prosecution in order to establish its case beyond reasonable doubt, must proceed to disprove or negate the defence's version.

[34] The sentiment which I want to express has accurately been captured in the case of *Aedy Osman v Public Prosecutor* [2011] 1 CLJ 273 where James Foong FCJ writing for the Federal Court stated as follows:

> ... it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defense in the course for the prosecution's witnesses than risking dismissal of its case for want of proof.

In this case prosecution had faced the issue of non-calling of Insp Saravanan not only at the end of the defense case but also at the end of the prosecution's case. The prosecution could have taken remedial measures but chose not to do so in this case by design rather than by ignorance.

[35] Being guided by the duty laid down in law it is my decision in this case that the prosecution has failed to prove the charge against the accused beyond reasonable doubt. The law under s 182A(ii) of the Criminal Procedure Code directs that if the court finds that the prosecution has failed to prove the charge

against the accused beyond reasonable doubt the court shall record an order of acquittal.

[36] Abiding by the law I directed the accused to be acquitted and discharged of the charge against him.

Accused acquitted and discharged.

Reported by Ashok Kumar